

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JUDITH LEE FRARY,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:20-cv-00260-SAB

ORDER DENYING PLAINTIFF’S SOCIAL  
SECURITY APPEAL AND DIRECTING  
CLERK OF COURT TO CLOSE ACTION

(ECF Nos. 14, 15, 16)

**I.**

**INTRODUCTION**

Judith Lee Frary (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for disability benefits pursuant to the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Stanley A. Boone.<sup>1</sup>

Plaintiff suffers from degenerative disc disease, neuropathy, and foot degenerative joint disease. For the reasons set forth below, Plaintiff’s Social Security appeal shall be denied.

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<sup>1</sup> The parties have consented to the jurisdiction of a United States Magistrate Judge. (See ECF Nos. 7, 8, 17.)

## II.

### BACKGROUND

#### A. Procedural History

On October 11, 2016, Plaintiff filed a Title II application for a period of disability and disability insurance benefits, alleging a period of disability beginning on June 19, 2016. (AR 366-67, 391.) Plaintiff's claims were initially denied on March 9, 2017, and denied upon reconsideration on July 26, 2017. (AR 288-92, 298-303.) Plaintiff requested a hearing before an Administrative Law Judge, and on March 5, 2019, Plaintiff appeared with counsel before Administrative Law Judge Paul Armstrong (the "ALJ") for a hearing. (AR 162-96.) On March 12, 2019, the ALJ issued a decision finding that Plaintiff was not disabled based on finding Plaintiff could perform past relevant work. (AR 143-154.) On December 26, 2019, the Appeals Council denied Plaintiff's request for review. (AR 1-7.)

Plaintiff filed this action on February 20, 2020, and seeks judicial review of the denial of her application for disability benefits. (ECF No. 1.) Due to the COVID-19 public health emergency, the action was stayed until the filing of the administrative record, which was filed on November 23, 2020. (ECF Nos. 9, 10, 11.) On February 23, 2021, Plaintiff filed a brief in support of remand. (ECF No. 14.) On March 25, 2021, Defendant filed a brief in opposition. (ECF No. 15.) On March 30, 2021, Plaintiff filed a reply brief. (ECF No. 16.)

#### B. Hearing Testimony

Plaintiff testified at the March 5, 2019 hearing with the assistance of counsel. (AR 162-96.) The ALJ inquired whether the record was complete and counsel and the ALJ confirmed that newly submitted records were in the record. (AR 43.)

In 2015, after ten (10) years in the funeral industry, Plaintiff left the line of work after she received a certificate to sell life insurance and cemetery property in the State of Arizona. (AR 166-67.) The previous position as a prearrangement counselor became a commission only position, and Plaintiff described it as being a very high pressure sales job, even though the nature of the industry would not seem so, and thus after ten (10) years, Plaintiff "just needed a break." (AR 167.) Plaintiff then began work as a loan adviser in a call center, stating that while there

1 were “emotional effects from the funeral industry,” she was nonetheless able to get hired. (Id.)  
2 The position was with Drive Time, helping low-income individuals finance car purchases. (Id.)  
3 Working in the call center was a challenge because of Plaintiff’s back. (Id.) She did receive  
4 breaks and was able to stand, but the onset of weakness in her wrist and in her neck, resulted in  
5 the positioning of body mechanics being a challenge. (Id.) At that time, Plaintiff’s back was  
6 spasming quite frequently. (Id.) Plaintiff used a lot of sick days because she couldn’t get in the  
7 car to drive to work, stating she used almost all of her sick days except for maybe one before she  
8 left Arizona to join other family in California. (Id.)

9 Plaintiff had lived in Arizona for twenty (20) years, where her parents had retired. (Id.)  
10 After a divorce, Plaintiff had lifelong problems with depression, anxiety, and was diagnosed with  
11 bipolar disorder. (Id.) In the funeral industry, Plaintiff was starting to take medication for  
12 anxiety. (AR 167-68.) The ALJ then asked if all of the issues happened at once. Plaintiff  
13 answered she was married in 1998, that around 2014 she began having marital problems along  
14 with the job stress, and after being sober for fourteen (14) years, she began drinking again. (AR  
15 168.) Plaintiff had gone into a residential treatment program in 1996. (Id.)

16 Plaintiff stated the drinking helped relieve her anxiety and depression faster than the  
17 psychiatric medication, and stated she was active in her recovery, but began the bad behavior  
18 again. (AR 168-69.) Plaintiff confirmed she was still attending AA meetings, has a sponsor, and  
19 a counselor that she speaks with daily. (AR 169.)

20 Plaintiff was recommended to have surgery on both of her hands, and started with the  
21 right because she is right-handed. (AR 169-70.) Plaintiff stated the surgery did not help much,  
22 and that she did not get into physical therapy quickly, but was able to do exercises on her own.  
23 (AR 170.) Plaintiff uses a lot of compression, and if lifting anything very heavy, wears splints  
24 that support the thumb. (Id.) When asked if she can type and use a cell phone, Plaintiff stated  
25 her hands fatigue very easily, and she can maybe do such things for about ten (10) minutes. (Id.)  
26 When working on a computer, Plaintiff’s wrists get tired, and her neck gets painful in that  
27 position. (Id.) Plaintiff stated she was in progression to find out more about her neck, and was  
28 waiting for an MRI. (Id.) Plaintiff stated the neck was an old injury, but that she was

1 degenerating in a lot of physical ways. (Id.) Plaintiff stated she was fifty-eight (58) years old the  
2 day of the hearing, and some of her problems started when she was in her forties, some in her  
3 fifties, and that she doesn't think the problems are reversible. (Id.) Plaintiff was not sure about  
4 what the neck prognosis or diagnosis would be given she was waiting for the new back MRI.  
5 (Id.) Plaintiff testified she sees a chiropractor weekly, and when at home, knows proper body  
6 mechanics. (Id.) Plaintiff said she wears a brace, and is mindful to why and how she walks  
7 because of her ankles and feet. (AR 170-71.)

8 Plaintiff said she has a combination of several things, including mental issues, as well as  
9 physical issues related to her neck, wrists, shoulders, back, ankles, and feet. (AR 171.) Plaintiff  
10 stated she takes a lot of over-the-counter medicine because she can't take any narcotics,  
11 specifically cannot take benzopyrene. (Id.) When Plaintiff wakes up she starts right away with a  
12 combination of different nonsteroidal anti-inflammatory drugs, and continues throughout the  
13 day. (Id.) Plaintiff was prescribed Soma, which she just takes at night to help sleep. (Id.)  
14 Plaintiff does not take it during the day, because: many of her medications make her sleepy  
15 already; her thyroid disease also causes fatigue; her Synthroid causes sleepiness, the anti-anxiety  
16 medicine and the bipolar medicine also make her tired; and mid-morning she starts getting  
17 foggy. (Id.) Plaintiff tries to be mindful, drinks a lot of water, rests, and takes care of her  
18 physical needs as best she can. (Id.)

19 The ALJ then asked about whether Plaintiff thought she could perform her previous job  
20 in the funeral industry. (Id.) Plaintiff answered that because she was licensed in Arizona, she  
21 would have to go back to school. Additionally, in the last few years she had some very difficult  
22 families as clients, and that started taking a toll on her emotionally and it remains with her now.  
23 (AR 172.) Plaintiff stated the job was highly emotional, and had to meet with the families for  
24 funeral arrangements. (Id.) Plaintiff would prepare documentation for the burial, for internment,  
25 and would help the funeral director in the arrangement to coordinate graveside services. (Id.) It  
26 was a very emotional job as some clients had lost their child or a spouse, and with her own  
27 personal losses, Plaintiff lost her "edge if that would explain it in my ability to help families  
28 during a time of loss." Finally, she would have to go back to school to get a life insurance

1 license in California, which is difficult, and additionally, a cemetery sales person needs a real  
2 estate license as well. (AR 172-73.)

3 Plaintiff confirmed that Green Oak Ranch is a Christian based recovery organization that  
4 provides a sober-living environment where Plaintiff would receive daily counseling, behavioral  
5 health assistance, and go to for a safe environment to pull herself together and put her drug and  
6 alcohol use behind her. (AR 173.) Plaintiff stated she no longer lived at Green Oak Ranch,  
7 though afterward house-sat for the clinical director. Then through a mutual friend, Plaintiff  
8 began staying at a ranch and watching the property where dogs were raised. (Id.) Plaintiff stays  
9 on the property watching it while the friend is at work, and lives in a camper on the property.  
10 (Id.) Plaintiff would help with the dogs and feed the horses, though stated she couldn't do any  
11 heavy lifting or ride the horses anymore. (AR 174.)

12 Plaintiff testified she is able to do light work with no pressure, and can sit down  
13 whenever she wants. (Id.) With wearing braces, Plaintiff is very careful, taking her time and  
14 limiting herself to doing simple tasks, like sweeping or feeding the horses. (Id.) There are five  
15 older, calm horses that help keep her spirit up. (Id.) There are four dogs, like Border Collies,  
16 and other mixes. (AR 175.) When asked if the dogs help her, Plaintiff stated she tried an  
17 assistance dog, but the dog wasn't properly trained and actually ended up causing more stress.  
18 (Id.) Plaintiff does not receive compensation other than a free place to stay. (Id.) For living  
19 expenses, Plaintiff had been living off her savings, but recently needed to cash out some of her  
20 401k to help with her budget, which is around \$1,200 a month. (AR 176.)

21 In describing a past position, Plaintiff said she was classified as a loan adviser, but was  
22 more of a collection agent. The job was a high pressure position requiring her to make 160  
23 outgoing calls a day. (AR 177.) Plaintiff had to fulfill quotas, and said the experience was nice,  
24 but she was ready to do something different when her family encouraged her to move back to  
25 California after her parents had passed away, and her marriage was dissolved. (Id.) Plaintiff  
26 said her "anchor" was her sister's house in Oceanside, California. (Id.)

27 When asked about smoking cigarettes, Plaintiff stated she basically stopped, that she was  
28 drinking coffee and smoking because she was sleepy a lot, but she switched to a vaporizer and

1 keeps the use to a minimum. (AR 178.) Plaintiff said she is very conscientious about the  
2 cigarettes and nicotine as they are not good for her health and her medication, and the vaporizer  
3 has a really low content of nicotine. (Id.)

4 The ALJ asked how far Plaintiff could generally walk, and Plaintiff stated she has boots  
5 with custom orthotics, wears braces, and her most recent podiatrist was sending her for a custom-  
6 fit orthotic that would support her arch and ankle. Plaintiff walks better on level ground, and has  
7 to be mindful where she walks and how she walks, and was unsure how far. (AR 178-79.)  
8 Plaintiff said she doesn't have to walk very far on the ranch, so about maybe a football field  
9 length out to the corrals. (AR 179.) Plaintiff drives her car up their property on the hill, so  
10 doesn't have to walk very far in that regard. (Id.) The ALJ asked about the answers to a written  
11 questionnaire where Plaintiff indicated she still hiked and camped, and Plaintiff clarified that she  
12 meant to answer those were previous hobbies and that she no longer hikes or camps. (Id.)

13 Plaintiff then answered that she can only lift two (2) or three (3) pounds. (AR 180.) The  
14 ALJ then asked if she is able to work with the dogs and horses when she can only lift that much  
15 weight, and Plaintiff responded that she does not have to handle the horses as they are in the  
16 corrals and pasture, and on occasion she puts them in a halter, but they are older horses, and very  
17 mild mannered. (Id.)

18 The ALJ then asked why Plaintiff could not do a sales job that did not involve collections  
19 or selling funeral plots, such as her previous position with Home Depot, and why she would not  
20 be able to answer the phone at Home Depot or do other tasks involved in such position. (Id.)  
21 Plaintiff answered that they don't let her sit down and she would be on her feet. (AR 181.) The  
22 ALJ asked what about if the job allowed her to sit down, such as a customer service position or  
23 commercial ordering. Plaintiff answered that because of her neck and pain she is in, the  
24 neuropathy, her fatigue, and her age as she gets older, though the ALJ interjected and said age is  
25 a common factor for everybody. (AR 181-82.) Plaintiff continued that her degenerating body  
26 feels like everything is pricking and cracking, swollen and crunched, and the rate of pay would  
27 be at like a poverty level. (AR 182.) The ALJ responded that you have to start somewhere, and  
28 understood that her previous position was high paying because she was certified and had a lot of

1 experience in the field, and the high pressure position may pay more but the other lower paying  
2 jobs might be less stressful. (AR 182.) Plaintiff answered that she is not sure if she is  
3 marketable with doctor's appointments and the medicine that she is on, and needed time off if  
4 her back is out and needs to see the chiropractor, and has been seeing doctors a lot recently  
5 because of MRIs and follow-ups, in addition to seeing her psychiatrist on a regular basis. (AR  
6 183.) Plaintiff also said she is still trying to get in to see her therapist, and so with the medicine  
7 she just does not feel good a lot of times and does not know if she would have the energy for a  
8 retail job. (Id.) The ALJ responded that California has very good vocation resources available  
9 and a rehabilitation program that work with people to get a job they feel comfortable with at a  
10 good rate, stating Plaintiff has marketable credentials. (Id.)

11 Plaintiff's counsel then presented questions. (AR 184.) In response to the question of  
12 what other problems make it difficult to work, Plaintiff said the combination of different physical  
13 problems and the medication makes her think she would not be a reliable employee. (Id.)  
14 Plaintiff confirmed there was problems with her feet, in addition to an EMG which showed some  
15 neuropathy in the lower extremities, and confirmed that she has tingling that comes from her  
16 sciatica down her leg and into her ankle and so if starting from the feet up, it is her feet and  
17 ankles down her leg. (Id.) Plaintiff additionally has lower back problems from sciatica and  
18 degeneration. (Id.) Plaintiff also recently had a report on the C-spine showing a lot of  
19 degeneration in the discs and misalignment. (AR 184-85.) Plaintiff has thyroid disease that  
20 causes lethargy, medications make her foggy, and she cannot concentrate like she used to. (AR  
21 185.) The ALJ interjected and stated Plaintiff was doing great at the hearing, which is usually a  
22 stressful experience, and Plaintiff stated she had spent days and months writing everything down  
23 because she forgets. (Id.) Plaintiff continued explaining that without being able to lift she has to  
24 rest a lot, and she feels sore a lot and day to day. Plaintiff also stated she fights a lot of  
25 depression and anxiety, so when she gets very anxious, she cannot breathe, and her anxiety  
26 medication makes her really sleepy. (Id.) Therefore she walks a fine line because when she  
27 takes the medication she wants to drink coffee and smoke cigarettes, so it is like a juggling act.  
28 (Id.) Plaintiff stated it feels like she is dragging herself around all the time, and is so tired by

1 10:00 a.m., that she just shuts down. (AR 185-86.) Plaintiff has to rest to get her mind right, has  
2 to take over-the-counter pain medication, has to elevate, has to stretch her back, and there are  
3 neck exercises that she does and so has to be very mindful to work with what she has to maintain  
4 any functionality. (AR 186.)

5 Counsel then asked if there was anything else that would prevent her from working full  
6 time, and Plaintiff reiterated her anxiety and depression, that she is very moody and irritable, and  
7 the social anxiety would make it a challenge to work with the public. (Id.) Plaintiff also stated  
8 she suffers from twitches which occur when she is anxious or uptight, and they cause her to  
9 purse her lips and blink erratically, making her a little self-conscious. (Id.) Plaintiff again stated  
10 the arthritis is degenerative or progressive, that she has low energy, has chronic fatigue, erratic  
11 sleeping habits, and some days she just has a really hard time pulling it all together and keeping  
12 it on the rails. (AR 186-87.)

13 The Vocational Expert Robert Raschke (“VE”) then presented testimony. (AR 187.) The  
14 VE confirmed that the VE would testify in accordance with the information contained in the  
15 Dictionary of Occupational Titles (“DOT”), and that if there was a difference between the VE’s  
16 testimony and the DOT, the VE would inform the ALJ. (Id.) As for past relevant work, the VE  
17 testified that in the 1990s through about 2004, Plaintiff had a job as an administrative assistant,  
18 DOT code 169.167-010, skilled at level 7, and sedentary; that the work as a salesman in the  
19 funeral industry is DOT code 279.357-042, skilled at level 5, and light exertional; that the work  
20 at Home Depot was retail sales, hardware, DOT code 279.357-050, semiskilled at level 4, and  
21 light exertional, though appeared to be performed at medium because of stocking requirements,  
22 so 4 at light per DOT and 4 at medium as performed; and that the loan adviser call center  
23 position was classified as call center operator, DOT code 299.357-014, semiskilled at level 3,  
24 considered sedentary. (AR 187-88.) The VE then asked to confirm that the call center position  
25 was working with collections, and Plaintiff confirmed it was, and performed while on a  
26 keyboard, on the phone with her neck in a position where she was at the computer, which was  
27 difficult, and confirmed she made 160 calls per day, sitting with her bad back. (AR 188.) The  
28 VE then confirmed that classification as collections, or collection officer, or collection agent,



1 with DOT code 216.362-014, skilled at level 5, sedentary. (AR 189.)

2 The ALJ presented a hypothetical individual limited to light work, and the VE testified  
3 she could return to previous work. (Id.) The VE confirmed that a light classification would  
4 involve more standing, six hours of an eight-hour day, sitting two hours, lifting up to twenty (20)  
5 pounds, and ten (10) pounds repetitively. (AR 189-90.) The VE testified if she could perform  
6 light work, she could return to all of her past work with possibly the exception of the Home  
7 Depot position because that was performed at medium exertion, but the rest of the positions were  
8 light or sedentary. (AR 190.)

9 If Plaintiff was limited to sedentary work, the VE testified she could perform the  
10 collections agent/call center position, as they are like a customer service representative position  
11 which is classified at level 3 sedentary. (Id.) The VE stated the funeral sales position would be  
12 eliminated as that is closer to a light exertion. (Id.) The VE also stated the administrative  
13 assistant position is considered sedentary, but it depends on the employer, but per the DOT, the  
14 job would be available. (Id.)

15 The ALJ then asked the VE about what would change if the Plaintiff has problems  
16 reaching, fingering, and handling, and was limited to frequent, and the VE testified that such  
17 limitation would not eliminate the previous positions. (AR 190-91.) The ALJ then added a  
18 limitation to occasional, and the VE confirmed these previous positions would be eliminated.  
19 (AR 191.)

20 The ALJ then went back to the frequent limitation, and added that such person would be  
21 precluded from public contact work due to anxiety, and the VE stated that would eliminate  
22 anything that is sales related, and the only job that might still be available would be the  
23 administrative assistant, but the VE would need more information about public contact involved  
24 in the position. (AR 192.) Plaintiff answered that the assistant position was at a medical repair  
25 facility, so she was on the phones, doing shipping and receiving, and was the liaison with the  
26 corporate office. (Id.) Plaintiff handled equipment up to fifteen (15) to twenty (20) pounds.  
27 (Id.) The VE confirmed such position would involve occasional public contact eliminating the  
28 position, and also clarified that as described, that position would also be eliminated based simply

on the lifting, if she was limited to sedentary work. (AR 193.)

The ALJ then presented a situation where the person experiences fatigue, there are requirements such as production requirements such as the 160 calls to be completed, and such person could not meet such requirements by about fifteen percent (15%), and would be off task because of position problems and with fatigue. (*Id.*) The VE clarified that anytime questions pertained to absences or being off-task, the information would not be addressed in the DOT or any the companion manuals. (AR 193-94.) The VE testified that based on their experience, such amount of time off-task would equate to no work available, and that at that point you are no longer competitively employed, equating to being off six hours per week, or three days in a four-week month. (AR 194.) The VE confirmed this would apply to any exertional level. (*Id.*)

The ALJ then concluded the hearing. (AR 194-95.)

### **C. The ALJ's Findings of Fact and Conclusions of Law**

The ALJ made the following findings of fact and conclusions of law:

- Plaintiff meets the insured status requirements of the Social Security Act through December 31, 2021.
- Plaintiff has not engaged in substantial gainful activity since the alleged onset date of June 19, 2016.
- Plaintiff has the following severe impairments: degenerative disc disease, neuropathy, and foot degenerative joint disease.
- Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- Plaintiff has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) where the Plaintiff lifts or carries 20 pounds occasionally and 10 pounds frequently, stands or walks for six of eight hours during the workday, and sits for six of eight hours during the workday.
- Plaintiff is capable of performing past relevant work as an administrative assistant, funeral salesperson, retail salesperson, and loan advisor/collector. This work does not

1 require the performance of work-related activities precluded by the Plaintiff's residual  
2 functional capacity.

- 3 • Plaintiff has not been under a disability, as defined in the Social Security Act, from June  
4 19, 2016, through the date of the ALJ's decision, March 12, 2019.

5 (AR 146-154.)

### 6 III.

#### 7 LEGAL STANDARD

8 To qualify for disability insurance benefits under the Social Security Act, the claimant  
9 must show that he is unable "to engage in any substantial gainful activity by reason of any  
10 medically determinable physical or mental impairment which can be expected to result in death  
11 or which has lasted or can be expected to last for a continuous period of not less than 12  
12 months." 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five-step  
13 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §  
14 404.1520;<sup>2</sup> Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th  
15 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is  
16 disabled are:

17 Step one: Is the claimant presently engaged in substantial gainful activity? If so,  
18 the claimant is not disabled. If not, proceed to step two.

19 Step two: Is the claimant's alleged impairment sufficiently severe to limit his or  
20 her ability to work? If so, proceed to step three. If not, the claimant is not  
21 disabled.

22 Step three: Does the claimant's impairment, or combination of impairments, meet  
23 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the  
24 claimant is disabled. If not, proceed to step four.

25 Step four: Does the claimant possess the residual functional capacity ("RFC") to  
26 perform his or her past relevant work? If so, the claimant is not disabled. If not,  
27 proceed to step five.

28 Step five: Does the claimant's RFC, when considered with the claimant's age,  
education, and work experience, allow him or her to adjust to other work that  
exists in significant numbers in the national economy? If so, the claimant is not

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<sup>2</sup> The cases generally cited herein reference the regulations which apply to disability insurance benefits, 20 C.F.R. § 404.1501 et seq., and Plaintiff is also seeking supplemental security income, 20 C.F.R. § 416.901 et seq. The regulations are generally the same for both types of benefits. Further references are to the disability insurance benefits regulations, 20 C.F.R. §404.1501 et seq.

disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

Congress has provided that an individual may obtain judicial review of any final decision of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g). In reviewing findings of fact in respect to the denial of benefits, this court “reviews the Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (internal quotations and citations omitted). “Substantial evidence is relevant evidence which, considering the record as a *whole*, a reasonable person might accept as adequate to support a conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

“[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006)). However, it is not this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.”).

#### IV.

### DISCUSSION AND ANALYSIS

#### A. The Parties’ Primary Arguments and the Principal Legal Guidelines

Plaintiff submits one primary basis for remand: that the ALJ erred by not including her mild mental limitations in the RFC assessment. (Pl.’s Opening Br. (“Br.”) 4, ECF No. 14.) Because the ALJ found Plaintiff suffered from medically determinable impairments consisting of affective disorder and anxiety disorder (AR 149), and stated that Plaintiff suffered from a mild limitation in three of the four areas of mental functioning, Plaintiff argues the ALJ erred by

1 omitting these mental limitations in the RFC assessment.

2 While Defendant acknowledges the ALJ must consider all impairments when  
3 determining the RFC, including non-severe, Defendant argues no legal authority requires a non-  
4 severe impairment to impose any restriction on an RFC, and in fact, the Ninth Circuit has gone  
5 so far to state a *severe* impairment does not need to correlate to any specific limitation or  
6 restriction in the RFC, Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228–29 (9th Cir.  
7 2009). (Opp’n 6-7.) Defendant argues that because the case was decided at step four, Plaintiff  
8 has the burden, and failed to meet their burden of proving they cannot perform past work.  
9 Defendant also argues that the medical opinions in the record found no work-related restrictions  
10 from mental impairments, which the ALJ assigned significant weight to, and because the ALJ  
11 properly relied on these opinions, and no other opinions contradicted their conclusion, the  
12 decision should be affirmed. Additionally, Defendant argues that the lay witness testimony was  
13 properly rejected, which addressed mental limitations, and the ALJ relied on daily activities in  
14 addressing Plaintiff’s claimed limitations, which were not challenged by Plaintiff.

15 In consideration of the parties’ arguments, for the reasons explained herein, the Court  
16 finds no remandable error.

17 The ALJ must consider both severe and nonsevere medically determinable impairments  
18 when determining the RFC. See 20 C.F.R. § 404.1545(a)(2) (“We will consider all of your  
19 medically determinable impairments of which we are aware, including your medically  
20 determinable impairments that are not ‘severe,’ as explained in §§ 404.1520(c), 404.1521, and  
21 404.1523, when we assess your residual functional capacity.”); 20 C.F.R. § 404.1545(e) (“When  
22 you have a severe impairment(s), but your symptoms, signs, and laboratory findings do not meet  
23 or equal those of a listed impairment in appendix 1 of this subpart, we will consider the limiting  
24 effects of all your impairment(s), even those that are not severe, in determining your residual  
25 functional capacity.”). Plaintiff correctly argues that as for mental limitations, the ALJ was  
26 required to take the degree of functional loss imposed by the impairments as described in the  
27 four broad categories of 20 C.F.R. § 404.1520(a), and provide a “more detailed assessment by  
28 itemizing various functions” when determining the RFC. Titles II & XVI: Assessing Residual

1 Functional Capacity in Initial Claims, SSR 96-8P (S.S.A. July 2, 1996). (Br. 5.) This SSR  
2 states:

3           The adjudicator must remember that the limitations identified in  
4           the “paragraph B” and “paragraph C” criteria are not an RFC  
5           assessment but are used to rate the severity of mental  
6           impairment(s) at steps 2 and 3 of the sequential evaluation process.  
7           The mental RFC assessment used at steps 4 and 5 of the sequential  
8           evaluation process requires a more detailed assessment by  
9           itemizing various functions contained in the broad categories found  
10           in paragraphs B and C of the adult mental disorders listings in  
11           12.00 of the Listing of Impairments, and summarized on the PRTF.

12 SSR 96-8P.

13           The ALJ did expressly cite to SSR 96-8P and its requirements, in the opinion. The ALJ  
14 first stated Plaintiff’s “medically determinable mental impairments of affective disorder and  
15 anxiety, considered singly and in combination, do not cause more than minimal limitation in the  
16 claimant’s ability to perform basic mental work activities and are therefore nonsevere.” (AR  
17 149.) The ALJ made this conclusion based on consideration of the four broad areas of mental  
18 functioning, finding Plaintiff suffered from mild limitations in the areas of: (1) understanding,  
19 remembering, applying information; (2) interacting with others; and (3) concentrating, persisting,  
20 or maintaining pace.<sup>3</sup> (AR 149.) The ALJ found the Plaintiff had no limitation in the fourth  
21 functional area of adapting or managing oneself. (AR 150.) The ALJ then expressly identified  
22 these four areas as the paragraph B criteria (20 C.F.R., Part 404, Subpart P, Appendix 1), and  
23 recognized that these criteria are “not a residual functional capacity assessment but are used to  
24 rate the severity of mental impairments at steps 2 and 3 of the sequential evaluation process,”  
25 that the “mental residual functional capacity assessment used at steps 4 and 5 of the sequential  
26 evaluation process requires a more detailed assessment by itemizing various functions contained  
27 in the broad categories found in paragraph B of the adult mental disorders listings in 12.00 of the  
28 Listing of Impairments (SSR 96-8p),” and that “therefore, the following residual functional  
capacity assessment reflects the degree of limitation the undersigned has found in the ‘paragraph

<sup>3</sup> Understanding, remembering, applying information “refers to the abilities to learn, recall, and use information to perform work activities.” 20 C.F.R. § Pt. 404, Subpt. P, App. 1. Interacting with others “refers to the abilities to relate to and work with supervisors, co-workers, and the public.” *Id.* Concentrating, persisting, or maintaining pace “refers to the abilities to focus attention on work activities and to stay on-task at a sustained rate.” *Id.*

1 B' mental function analysis." (AR 150.)

2 Plaintiff argues that the ALJ's statement that the RFC reflected the "degree of limitation  
3 the undersigned has found in the 'paragraph B' mental function analysis," (AR 150), is language  
4 that has been rejected by other courts where it is shown only to be a hollow statement of the legal  
5 standard that wasn't actually demonstrated to have been followed in the ALJ's opinion. (Br. 5  
6 n.2.). The cases cited by the Plaintiff as to this argument indeed have similarities to the case at  
7 hand.

8 In Smith, like here, the ALJ found that Smith did not have a severe mental impairment at  
9 step two, but did find Smith had mild limitations in three of the four areas of mental functioning  
10 (the paragraph B criteria). Smith v. Colvin, No. 14-CV-05082-HSG, 2015 WL 9023486, at \*8  
11 (N.D. Cal. Dec. 16, 2015). The Smith court found that "[w]hile the ALJ stated that her  
12 assessment of Plaintiff's RFC 'reflects the degree of limitation I have found in paragraph B  
13 mental function analysis,' [] the record does not demonstrate that the ALJ considered these mild  
14 mental limitations when assessing her RFC." Id. The court rejected the Commissioner's  
15 argument that the ALJ was not required to include mild mental limitations in the RFC  
16 assessment where evidence of mental allegations were elsewhere discounted or rejected, citing  
17 the unpublished opinion in Hutton v. Astrue, 491 Fed. Appx. 850 (9th Cir. 2012):

18 Defendant argues that the ALJ was not required to include mild  
19 mental limitations in her RFC assessment because the ALJ  
20 properly rejected Dr. Weems' psychiatric opinion and discredited  
21 Plaintiff's mental condition allegations. [] While the ALJ was not  
22 required to include properly rejected evidence, she could not  
disregard her own finding that Plaintiff had mild mental limitations  
in three out of the four broad functional areas . . . The current  
record is unclear as to whether the ALJ properly considered the  
claimant's mild mental limitations when assessing her RFC.

23 Smith, 2015 WL 9023486, at \*9.

24 Plaintiff also cites Patricia C., wherein the ALJ utilized the same paragraph B statement  
25 used by the ALJ here. See Patricia C. v. Saul, No. 19-CV-00636-JM-JLB, 2020 WL 4596757, at  
26 \*13 (S.D. Cal. Aug. 11, 2020), report and recommendation adopted sub nom. Craig v. Saul, No.  
27 19CV636 JM (JLB), 2020 WL 5423887 (S.D. Cal. Sept. 10, 2020). The ALJ in Patricia C. also  
28 expressly incorporated the analysis of the nonsevere ailments into the RFC analysis, and the



1 court found that by simply incorporating the Step 2 analysis, the ALJ must not have performed  
 2 the more detailed analysis that is required in the RFC determination section:

3 Despite this acknowledgement and despite his recognition that the  
 4 mental RFC assessment “requires a more detailed assessment” than  
 5 that made at Step Two, the ALJ’s discussion of Plaintiff’s RFC  
 6 contains no analysis of Plaintiff’s mild mental limitations. [An  
 7 argument could be made that the ALJ assessed Plaintiff’s mental  
 8 RFC at Step Two when he followed the special technique and  
 9 addressed the paragraph B criteria. However, the hearing decision  
 10 does not make clear that this is what the ALJ intended, and in any  
 11 event, the ALJ’s analysis of the paragraph B criteria does not shed  
 12 sufficient light on why the mild mental limitations found by the  
 13 ALJ were not included in the RFC.] Instead, the ALJ stated simply  
 14 that “[t]he analysis of the claimant’s nonsevere impairments, supra,  
 is incorporated by reference herein.” (AR 20.) By incorporating  
 the *same* Step Two severity assessment into the RFC assessment,  
 the ALJ inarguably did not make “a more detailed assessment.”  
 Further, the ALJ’s “boilerplate assertion...that his RFC assessment  
 ‘reflects the degree of limitation the undersigned has found in the  
 “paragraph B” mental function analysis’ was not  
 sufficient.” See *Uranna G.*, 2019 WL 5342537, at \*4. The ALJ  
 does not articulate why, after finding that Plaintiff had mild mental  
 limitations in each of the four broad categories, he did not include  
 any restrictions related to those limitations in the RFC.

15 Patricia C., 2020 WL 4596757, at \*13 (footnote 11 entered in brackets above).

16 Plaintiff submits that the alleged error here is material because of the skilled or  
 17 semiskilled nature of the past relevant work, and the limitations in the functional areas call into  
 18 question the finding that she could perform past relevant work. (Br. 6.) Plaintiff contends that  
 19 even the mild limitations in the three areas identified by the ALJ here (i.e. (1) understanding,  
 20 remembering, applying information; (2) interacting with others; and (3) concentrating, persisting,  
 21 or maintaining pace), would likely impact the ability to perform the job of administrative  
 22 assistant, as well as her other past work.<sup>4</sup> (Br. 7-8.) Specifically, Plaintiff argues a mild

23 <sup>4</sup> Plaintiff directs the Court to the DOT description of Administrative Assistant, defined as follows:

24 Aids executive in staff capacity by coordinating office services, such as personnel, budget  
 25 preparation and control, housekeeping, records control, and special management studies: Studies  
 26 management methods in order to improve workflow, simplify reporting procedures, or implement  
 27 cost reductions. Analyzes unit operating practices, such as recordkeeping systems, forms control,  
 28 office layout, suggestion systems, personnel and budgetary requirements, and performance  
 standards to create new systems or revise established procedures. Analyzes jobs to delimit position  
 responsibilities for use in wage and salary adjustments, promotions, and evaluation of workflow.  
 Studies methods of improving work measurements or performance standards. Coordinates  
 collection and preparation of operating reports, such as time-and-attendance records, terminations,



1 limitation in the abilities to analyze, interpret, study, organize information (understand,  
 2 remember and concentrate), and to interview and orientate new employees (relate to coworkers),  
 3 would likely impact the ability to perform the job of administrative assistant. (Br. 7-8.) Plaintiff  
 4 further contends the positions of funeral salesperson DOT 279.357-042 and salesperson, retail  
 5 DOT 279.357-050, both require extensive interaction with people, and therefore, even a mild  
 6 limitation in an indispensable job requirement could preclude performance of that occupation.  
 7 (Br. 8.) Finally, Plaintiff submits that the position of collector requires significant compiling  
 8 skills, ability to read letters of instruction and negotiable instruments (understand and  
 9 remember), and the ability to examine, calculate interest, and trace items (concentration). Thus,  
 10 Plaintiff submits that the ALJ should have elicited testimony from the vocational expert to  
 11 interpret and evaluate appellant's medically documented non-exertional psychological and  
 12 emotional limitations, which included limitations in the exercise of judgment, making  
 13 occupational adjustments, dealing with work stresses, concentrating, understanding,

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14 new hires, transfers, budget expenditures, and statistical records of performance data. Prepares  
 15 reports including conclusions and recommendations for solution of administrative problems.  
 16 Issues and interprets operating policies. Reviews and answers correspondence. May assist in  
 17 preparation of budget needs and annual reports of organization. May interview job applicants,  
 conduct orientation of new employees, and plan training programs. May direct services, such as  
 maintenance, repair, supplies, mail, and files. May compile, store, and retrieve management data,  
 using computer.

18 DOT No. 169.167-010, available at <https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOT01E>  
 19 (last accessed October 25, 2021). Plaintiff directs the Court to the DOT description of Collection Clerk, defined as  
 follows:

20 Receives and processes collection items (negotiable instruments), such as checks, drafts, and  
 21 coupons presented to bank by customers or corresponding banks: Reads letter of instructions  
 22 accompanying negotiable instruments to determine disposition of items. Debits bank account and  
 23 credits customer's account to liquidate outstanding collections. Computes interest on bills of  
 24 exchange (drafts), using adding machine or computer terminal, and lists debits and credits on  
 liability sheet, or enters information into computer system, to record customer's outstanding  
 balance. Examines, calculates interest on, endorses, records, and issues receipts, and mails  
 outgoing collections for payment. Traces unpaid items to determine reasons for nonpayment and  
 notifies customer of disposition. May prove and balance daily transactions. May act as agent for  
 collections payable in United States and possessions and be designated Out-of-Town Collection  
 Clerk (financial). May process collection items drawn on local bond and securities exchanges or  
 transfers within a locality and be designated Local Collection Clerk (financial). May collect  
 foreign bills of exchange and be designated Foreign-Collection Clerk (financial). May process  
 matured bonds and coupons and be designated Coupon-and-Bond-Collection Clerk (financial);  
 Coupon-Collection Clerk (financial).

28 DOT No. 216.362-014, available at <https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOT02A>  
 (last accessed October 25, 2021).

remembering, and carrying out job instructions. (Br. 7-8, citing Allen v. Sullivan, 880 F.2d 1200-1201 (11th Cir. 1989).)

What appears most significant to each of the parties' respective positions is the unpublished Ninth Circuit opinion of Hutton, and the numerous district court cases that cite to the opinion (including Smith, 2015 WL 9023486, and Patricia C., 2020 WL 4596757, supra). In Hutton, the Ninth Circuit reversed for failure to consider the effect of mild PTSD when determining the RFC:

Regardless of its severity, however, the ALJ was still required to consider Hutton's PTSD when he determined Hutton's RFC. *See* 20 C.F.R. § 404.1545(a)(2) ("We will consider all of your medically determinable impairments of which we are aware, including your medically determinable impairments that are not 'severe[.]' "). The ALJ, however, failed to do so. Instead, the ALJ discredited Hutton, his treating physicians' opinions, and the VA's disability rating. We do not base our action, however, on any of these determinations by the ALJ. Importantly, the ALJ then mischaracterized Mrs. Hutton's testimony at least five times. Finally, the ALJ concluded that, based on Hutton's lack of credibility, his PTSD claims were in "great doubt." On that basis, the ALJ excluded Hutton's PTSD from consideration. This exclusion was legal error. To determine Hutton's RFC properly, the ALJ was required to consider Hutton's physical impairments and the "mild" limitations his PTSD caused with concentration, persistence, or pace, regardless of whether the ALJ doubted that they were caused by Hutton's ever-shifting military history. *See* 20 C.F.R. § 404.1545(a)(2). Further, while the ALJ was free to reject Hutton's testimony as not credible, there was no reason for the ALJ to disregard his own finding that Hutton's nonsevere PTSD caused some "mild" limitations in the areas of concentration, persistence, or pace.

Hutton, 491 F. App'x at 850–51. Plaintiff argues that because she has other severe impairments, limiting her to light work, the presence of mild mental limitations may eliminate the ability to perform the past work, as Hutton shows that even a mild mental limitation can and does preclude skilled and semi-skilled work activity in the right circumstances. (Br. 9-10, citing Patricia C., 2020 WL 4596757 at \*12.) Given the Court finds the parties' respective positions appear to turn on Hutton and the way it has been utilized by various district courts depending on the specific factual circumstances, the Court now turns to consideration of cases wherein district courts found the ALJ erred based on Hutton, and the line of cases that distinguish Hutton and found no error.

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**B. Caselaw Finding Error based on Hutton**

In Aida I., the court found the ALJ erred in not incorporating any mild mental limitations in the hypotheticals to the VE despite affording the objective medical evidence of such great weight, and thus the ALJ's finding of the ability to perform past work was not supported:

Thus, the mere fact that the ALJ's nonseverity finding here was supported by the substantial evidence of record is not dispositive of whether the ALJ needed to account for the mild mental limitations underlying the nonseverity finding in his RFC assessment and his hypotheticals to the VE [Hutton and related cases] . . . Here, the ALJ did purport to consider all of the evidence relating to plaintiff's mental impairments in connection with his determination of plaintiff's RFC . . . However, the objective medical evidence with respect to plaintiff's mental impairments, to which the ALJ stated he was according "great weight," merely substantiated the ALJ's step two nonseverity finding. (*See* AR 119.) For example, in support of their nonseverity finding, the state agency psychological consultants had found that plaintiff had mild limitations in the first three of the four broad functional areas and no limitation in the fourth . . . And, the ALJ never explained why he failed to include those specific mild functional limitations in his RFC assessment or in his hypotheticals to the VE, when the ALJ was seeking to ascertain whether plaintiff remained capable of performing her past skilled work as a loan officer . . .

. . . In the Court's view, the objective evidence of specific mild functional limitations here, which the ALJ never stated he was rejecting, is what distinguishes this case from cases in which courts have found *Hutton* to be inapplicable . . . Since the ALJ did not include any functional limitations relating to plaintiff's mental impairments in any of his hypotheticals to the VE underlying his step four determination (*see* AR 151-52), the Court cannot determine how the VE would have testified had the specific mild functional limitations to which Dr. Nicholson had opined been included in the hypotheticals posed. The Court therefore finds that the ALJ's finding at step four of the sequential evaluation process that plaintiff remained capable of performing her past relevant work as a loan officer is not supported by substantial evidence.

Aida I. v. Saul, No. 319CV00476AJBRNB, 2020 WL 434319, at \*4–5 (S.D. Cal. Jan. 28, 2020), report and recommendation adopted, No. 319CV00476AJBRNB, 2020 WL 1905356 (S.D. Cal. Apr. 17, 2020). Thus, the court found the evidence of specific mild functional limitations, which the ALJ never rejected, was distinguishable from cases where courts found no error.

In Solomon, the Court similarly found the ALJ erred in failing to include mild limitations in the RFC determination nor in the presentation to the VE, and contrasted cases in which the

ALJ did otherwise address mental limitations in formulating the RFC:

Although the ALJ determined Solomon had mental limitations that caused mild limitation in social functioning and concentration, persistence, and pace (A.R. 26-27), the ALJ's order provides no indication that the ALJ considered those limitations when calculating Solomon's RFC during Step 4 . . . The ALJ also erred by omitting the mental limitations from the hypothetical posed to the vocational expert . . . having determined that Solomon had "mild limitation" in social functioning, concentration, persistence, and pace, the ALJ was required to include those limitations in the hypothetical to the vocational expert . . . These omissions were particularly notable because the ALJ ultimately determined that Solomon could perform the occupation of project estimator, which has an SVP of 7 and is thus "skilled work." . . . Consequently, it seems possible that Solomon's limitations in concentration, persistence, and pace could prevent him from performing the occupation of project estimator.

Finally, the Commissioner's reliance on *Ball* and *Medlock* is misplaced. In *Ball*, the court noted that "the record shows that the ALJ *did* consider Plaintiff's mild mental limitations in formulating her RFC." 2015 WL 2345652 at \*3 (emphasis added). Similarly, in *Medlock*, the court noted that, "[u]nlike the ALJ in *Hutton*, the ALJ in this case thoroughly considered the medical evidence related to Plaintiff's mild medical impairment at step four before choosing not to include the limitations in the RFC determination." 2016 WL 6137399 at \*5. Here, in contrast, the record is silent on this key issue—the ALJ's opinion does not explain why Solomon's mental impairments were omitted from the RFC and hypotheticals.

Solomon v. Comm'r of Soc. Sec. Admin., 376 F. Supp. 3d 1012, 1021–22 (D. Ariz. 2019) (footnotes omitted).

In Uranna, the court found the ALJ's boilerplate citation to the paragraph B criteria discussed in SSR 96-8p, was not sufficient where the mild limitations were not adequately addressed in the RFC and hypotheticals to the VE:

The Court concurs with plaintiff that this case falls squarely under *Hutton*.<sup>6</sup> The ALJ here found mild limitations in two of the broad functional areas . . . Notwithstanding this acknowledgement [of the paragraph B criteria and SSR 96-9p], the ALJ discussed plaintiff's anxiety impairment only in connection with Finding No. 3 . . . The decision does not contain any discussion or reflect any reasoned consideration of the mild limitations caused by plaintiff's anxiety impairment in connection with Finding No. 5 (RFC). (See AR 26-30.) Nor does the decision contain any discussion or reflect any reasoned consideration of the mild limitations caused by plaintiff's anxiety impairment in connection with Finding No. 6 (past relevant work). (See AR 30.) The ALJ's boilerplate assertion

1 in connection with Finding No. 3 that his RFC assessment “reflects  
2 the degree of limitation the undersigned has found in the  
‘paragraph B’ mental function analysis” was not sufficient . . .

3 Uranna G. v. Saul, No. 3:18-CV-02117-RNB, 2019 WL 5342537, at \*4 (S.D. Cal. Oct. 21,  
4 2019). The court also could not determine the error was harmless. Id. (“Since the ALJ did not  
5 include in any of his hypotheticals to the VE any functional limitations relating to plaintiff’s mild  
6 limitation[s] . . . the Court also cannot determine how the VE would have testified had any such  
7 limitations been included in the hypotheticals posed. The Court does note that, when the ALJ  
8 included a functional limitation relating to plaintiff’s mild limitation in interacting with others in  
9 his second hypothetical . . . the VE testified that all of plaintiff’s past work would be  
10 precluded.”).

11 The court in Carlson similarly found the paragraph B criteria statement used by the ALJ  
12 was insufficient where there was no apparent “reasoned consideration” of the mental  
13 impairments in the RFC assessment:

14 But the ALJ in no way attempted to reconcile Dr. Forman’s finding  
15 of no mental impairment with his own finding of “mild” mental  
16 impairments . . . As in Hutton, the ALJ did not discuss or give  
17 reasoned consideration of the plaintiff’s depression and anxiety in  
18 his RFC assessment. The ALJ did not explain that he had  
19 considered the mild mental limitations or nonsevere impairments  
20 and offered only boilerplate language that the plaintiff’s RFC  
21 “reflects the degree of limitation I found in ‘paragraph B’ mental  
function analysis.” . . . While the ALJ was not required to include  
properly rejected medical-opinion evidence of other providers, he  
could not disregard his own finding that the plaintiff had mild  
mental limitations. . . . Moreover, the ALJ’s VE hypotheticals did  
not take into account the plaintiff’s mental limitations[.]

22 Carlson v. Berryhill, No. 18-CV-03107-LB, 2019 WL 1116241, at \*17–18 (N.D. Cal. Mar. 10,  
23 2019) (footnotes omitted). In Gates, the court similarly found the paragraph B language did not  
24 sufficiently counter the fact that there was no clear reasoned discussion in the RFC analysis  
25 pertaining to the mental condition connected to the ALJ’s finding of a mild limitation:

26 As in Hutton, however, when the ALJ went on to assess the  
27 medical evidence of record in order to determine the RFC, he did  
28 not consider Plaintiff’s nonsevere limitation in social functioning . .  
. The ALJ could reject Plaintiffs testimony as not credible, but did

that not permit him to disregard his own finding that Plaintiff's anxiety disorder caused a mild impairment in social functioning.

The district court cases cited by Plaintiff are consistent with this result . . . According to *Medlock*, the "consideration" requirement is met if the ALJ "actually reviews the record and specifies reasons supported by substantial evidence for not including the non-severe impairment...." *Id.* It is not sufficient, however, for the ALJ to merely "rely on boilerplate language...." *Id.* . . . Here, the ALJ's decision does not reflect an actual consideration and reasoned determination as to why the mild social functioning limitation was not included in the RFC. The Commissioner concedes that the decision does not show that the ALJ clearly and explicitly considered Plaintiff's mild mental disorder as part of the RFC determination, but asks the Court to "infer" that the ALJ did so . . . The Court declines this invitation because the suggested approach of finding the required consideration by "inference" is inconsistent with *Hutton*, the subsequent district court decisions, and the regulation, and it would encourage use of boilerplate language as opposed to actual assessment of all impairments in arriving at an RFC.

Gates v. Berryhill, No. ED CV 16-00049 AFM, 2017 WL 2174401, at \*2–3 (C.D. Cal. May 16, 2017); see also Smith v. Colvin, No. 14-CV-05082-HSG, 2015 WL 9023486, at \*8–9 (N.D. Cal. Dec. 16, 2015) ("While the ALJ stated that her assessment of Plaintiff's RFC 'reflects the degree of limitation I have found in [the paragraph B criteria]' . . . the record does not demonstrate that the ALJ considered these mild mental limitations when assessing her RFC.").

### **C. Caselaw Finding No Error Based on Hutton**

Now the Court considers cases where courts found no error despite the plaintiffs' arguments of error based on Hutton. The Court first considers Sanguras, which Defendant cites as holding that "the ALJ did not run afoul of *Hutton v. Astrue* by finding no mental limitations in the RFC where the ALJ discussed evidence regarding the mental impairment when evaluating RFC." (Opp'n 10.)

The Sanguras court recently noted that "courts determined *Hutton* is 'inapplicable where the record demonstrates that the ALJ considered a claimant's non-severe mental impairments before concluding that they did not cause any significant limitation necessitating inclusion in the RFC.'" Sanguras v. Saul, No. 1:19-CV-1036 JLT, 2021 WL 973940, at \*5 (E.D. Cal. Mar. 16, 2021) (Sanguras) (quoting Thompson v. Saul, No. 1:18-CV-00137-BAM, 2019 WL 3302471, at



\*7 (E.D. Cal. July 23, 2019) (“Thompson”); George A. v. Berryhill, No. 5:18-CV-00405-AFM, 2019 WL 1875523, at \*4–5 (C.D. Cal. Apr. 24, 2019) (“George”); and citing Denney v. Saul, No. 1:18-CV-00689-GSA, 2019 WL 4076717, at \*7–8 (E.D. Cal. Aug. 29, 2019) (“Denney”).<sup>5</sup>

The Sanguras court explained that George and Denney found no reversible error where the ALJs found a claimant’s mental impairments to be non-severe at step two, and then considered related additional evidence of the claimant’s mental impairments at step four. Sanguras, 2021 WL 973940, at \*5 (citations omitted). The Sanguras court found the ALJ’s discussion of other such evidence after step two, was sufficient and in line with the facts and reasoning in Denney and George:

Similarly, here, the ALJ identified “mild limitations in concentrating, persistence, or maintaining pace” and “mild limitations in adapting or managing oneself” in evaluating the Paragraph B criteria at step two. (Doc. 7-3 at 32) The ALJ indicated that in formulating the RFC, she considered “all symptoms” and “the entire record.” (*Id.*) For example, the ALJ noted Plaintiff reported she was “able to finish what she starts and she could follow instructions very well.” (*Id.* at 33, citing Exh. 2E and 6E) The ALJ also noted Plaintiff took Xanax “to help with anxiety and sleep, but she was down to taking them as needed.” (*Id.* at 35) Further, ALJ noted Plaintiff was “able to prepare simple meals, do housework such as dishes, dusting, laundry and ironing, go outside, shop in stores and by computer, and socialize with others.” (*Id.* at 33; *see also id.* at 35) The ALJ found some of the “mental abilities and social interactions required in order to perform these activities are the same as those necessary for obtaining and maintaining employment.” (*Id.* at 35) As in Denney and George A., it is clear the ALJ considered evidence related to Plaintiff’s mental impairments after step two, including her activities of daily living and evidence concerning her ability to complete tasks and follow instructions. Thus, the record does not support Plaintiff’s assertion that the ALJ did not consider her nonsevere mental impairment in formulating the RFC.

Sanguras, 2021 WL 973940, at \*5. The Sanguras court went on to further find no error in the ALJ’s omission of the mild mental limitations in the presentation of hypotheticals to the VE:

The omission of mental limitations from the RFC rather reflects the conclusion that the impairments would not interfere with the ability to perform basic work activities, which the ALJ reached at

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<sup>5</sup> In reply briefing, Plaintiff did not directly respond to the Defendant’s citation to Sanguras, nor Denney, which was cited as collecting cases on these issues.

step four after considering Plaintiff's ability to complete tasks, follow instructions, medical record, and daily activities. Consequently, the Court finds Plaintiff fails to show the ALJ did not adequately consider her mental impairments with the RFC [citations] . . . Only limitations supported by substantial evidence must be included in questions presented to vocational experts. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 886 (9th Cir. 2006). An ALJ need not include "any impairments that the ALJ has properly rejected." *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002). Thus, if an ALJ finds a mild mental impairment is adequately addressed in an RFC that omits mental limitations, the hypothetical questions posed to the vocational expert need not include mental limitations. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1163-65 (9th Cir. 2001) (explaining it is "proper for an ALJ to limit a hypothetical" and finding the ALJ did not err by omitting any limitations for depression when questioning the vocational expert where the record showed Osenbrock's "depression [was] a mild impairment, which presented no significant interference with the ability to perform basic work-related activities"); *Bias v. Astrue*, 484 Fed. Appx. 275, 276 (10th Cir. 2012) (when the ALJ finds there are no work-related limitations related to a nonsevere mental impairment, "the ALJ is not required to include that impairment in his hypothetical"). Because the ALJ determined Plaintiff's nonsevere depression did not require limitations in the RFC, the ALJ did not need to include mental limitations in the hypothetical questions posed to the vocational expert to determine Plaintiff's ability to perform work in the national economy.

Sanguras, 2021 WL 973940, at \*6.

The Denney court made a similar determination, explaining that the ALJ's brief discussion at step four following a detailed discussion at step two is not erroneous where the specified reasons are sufficiently supported by substantial evidence within the decision overall:

[*Hutton*] is factually distinguishable from Plaintiff's case. First, at step two, the ALJ emphasized that although Plaintiff's mental impairments contributed to a finding that her multiple impairments were collectively severe, they were not severe impairments individually. He found that any limitation resulting from Plaintiff's mental impairments alone was at most mild. He gave little weight to the treatment records, finding that Plaintiff did not take prescribed anti-depressive medication. In addition, Plaintiff maintained activities of daily living that were inconsistent with a conclusion that her mental impairments severely impacted her functional abilities.

The ALJ did not err in addressing Plaintiff's mental impairments in great detail at step two and briefly at step four. Although an ALJ must discuss and evaluate evidence leading to his conclusion, he is not required to do so under any particular heading in his written decision. *Kennedy v. Colvin*, 738 F.3d 1172, 1178 (9th Cir. 2013) (quoting *Lewis v. Apfel*, 236 F.3d 503, 513 (9th Cir. 2001)). An ALJ's discussion of the relevant medical evidence elsewhere in his



1 decision should be considered in conjunction with a separate but  
2 related discussion of residual functional capacity at step  
3 four. *Evenhus v. Astrue*, 815 F.Supp.2d 1154, 1160 (D. Ore. 2011).  
4 Any such separate discussion constitutes sufficient  
5 consideration. *Id.* “[A]s long as the ALJ ‘actually reviews the  
6 record and specifies reasons supported by substantial evidence  
7 supported by substantial evidence for not including the non-severe  
8 impairment [in the RFC determination], the ALJ has not  
9 committed legal error.’ ” *Lindsay v. Berryhill*, 2018 WL 3487167  
10 at \*6 (C.D. Cal. July 18, 2018) (No. SACV 17-01545-AFM)  
11 (quoting *Medlock v. Colvin*, 2016 WL 6137399 at \*5 (C.D. Cal.  
12 Oct. 20, 2016) (No. CV 15-9609-KK)).

13 Denney v. Saul, No. 1:18-CV-00689-GSA, 2019 WL 4076717, at \*7–8 (E.D. Cal. Aug. 29,  
14 2019).

15 In Thompson, the court found no error where the ALJ did not include any of the mild  
16 mental limitations found in step two, within the RFC determination. Like the case at hand, the  
17 ALJ did incorporate the statement that the paragraph B criteria were reflected in the RFC, and  
18 considered other evidence in the step four discussion:

19 Here, at step two, the ALJ found that Plaintiff's mental  
20 impairments caused no more than mild limitations in her activities  
21 of daily living, social functioning and concentration, persistence or  
22 pace. AR 25-26. Although the ALJ did not include any mental  
23 limitations in the RFC assessment, the ALJ expressly stated that  
24 his RFC assessment reflected the degree of limitation he found in  
25 the “paragraph B” mental function analysis,” and the assessments  
26 finding her no more than mildly limited in mental functioning were  
27 “given great weight because they [were] consistent with the  
28 claimant's treatment records indicating generally well-controlled  
depression and anxiety through conservative treatment modalities.”  
AR 26.

Moreover, at step four, the ALJ expressly considered evidence of  
Plaintiff's mental impairments. In particular, the ALJ considered  
treatment records reflecting that Plaintiff received treatment for  
situational stress while caring for her husband's elderly parents.  
AR 29, 339. The ALJ also considered opinion evidence from  
Plaintiff's treating doctor, Kenneth Hua, M.C., that certain  
psychological conditions affected Plaintiff's physical condition and  
frequently interfered with her ability to perform even simple tasks.  
AR 30, 670-74. The ALJ gave only partial weight to this  
assessment, limiting her to the postural and environmental  
restrictions assessed by Dr. Hua. AR 30. Plaintiff has not  
challenged the ALJ's evaluation of Dr. Hua's opinion. AR 30. For  
these reasons, the Court finds that the ALJ properly considered  
Plaintiff's non-severe mental impairments at step four before  
concluding that those non-severe impairments did not necessitate

1 inclusion of any mental limitations in the RFC. *Hutton* therefore is  
2 inapplicable.

3 Thompson v. Saul, No. 1:18-CV-00137-BAM, 2019 WL 3302471, at \*7 (E.D. Cal. July 23,  
4 2019).

5 In George, the court acknowledged the differing conclusions reached by courts based on  
6 Hutton, and found no error where the ALJ first found mild limitations at step two, and then  
7 considered other evidence pertaining to the mental impairments again at step four, including in  
8 weighing physician opinions and describing daily activities:

9 Numerous courts in this Circuit have followed *Hutton* and found  
10 reversible error where the ALJ failed to include mild mental  
11 limitations in the assessment of the RFF. [citations] Other courts  
12 have found *Hutton* to be inapplicable where the record  
13 demonstrates that the ALJ considered a claimant's non-severe  
14 mental impairments before concluding that they did not cause any  
15 significant limitation necessitating inclusion in the RFC. [citations]

16 Here, at step two, the ALJ found that Plaintiff's mental  
17 impairments caused no more than mild limitations in daily living;  
18 social functioning; and concentration, persistence or pace, and  
19 therefore, were not severe. (AR 18-19.) Then, in assessing  
20 Plaintiff's RFC at step four, the ALJ considered Plaintiff's mental  
21 impairments again. (AR 20-21.) In particular, the ALJ considered  
22 the August 2014 report of the psychiatric consultative examiner,  
23 Linda M. Smith, M.D . . . The ALJ discussed Dr. Smith's mental  
24 status examination . . . The ALJ also discussed Dr. Smith's opinion  
25 . . . The ALJ accorded Dr. Smith's opinion "significant weight"  
because Dr. Smith had personally examined Plaintiff and her  
opinion was consistent with the objective findings in the medical  
evidence of record. (AR 24.)

26 The ALJ also considered other evidence in the record relevant to  
27 Plaintiff's non-severe mental impairments. Specifically, the ALJ  
28 noted that Plaintiff's daily activities required the same mental and  
social abilities "necessary for obtaining and maintaining  
employment," such as running errands, going to malls, attending  
college, and performing household chores. (AR 24.) Thus, the ALJ  
properly considered Plaintiff's non-severe mental impairments at  
step four before concluding that those non-severe impairments did  
not necessitate inclusion of any limitation in the RFC. *Hutton* does  
not apply in these circumstances.

29 George A. v. Berryhill, No. 5:18-CV-00405-AFM, 2019 WL 1875523, at \*4-5 (C.D. Cal. Apr.  
24, 2019). Like here, the claimant in George also argued that the past work could be impacted  
by the mild limitations and argued the ALJ erred by not including such limitations in the

1 presentation to the VE. The ALJ found no error:

2 Finally, Plaintiff argues that his past work as a salesperson requires  
 3 “intense interaction with others and a skill set that could be  
 4 effected by even mild limitations.” (ECF No. 19 at 8.) Plaintiff,  
 5 however, fails to point to any evidence in the record that his step  
 6 two mild limitation in social functioning would impact his work  
 7 abilities. While Dr. Smith opined that Plaintiff was mildly  
 8 impaired in his social function, she did not opine that this mild  
 9 impairment resulted in any concrete work-related limitation. In  
 10 fact, as the ALJ noted, Plaintiff reported having no problems  
 11 getting along with “family, friends, neighbors, or others.” (AR 18-  
 12 19, citing AR 247, 346.) Furthermore, the State agency physicians  
 13 both concluded that Plaintiff could perform his past relevant work  
 14 despite mild impairment in social functioning. (See AR 69-73, 86-  
 15 91.) Given the absence of evidence that Plaintiff’s mild mental  
 16 impairments limited Plaintiff’s ability to perform any work-related  
 17 activities, the ALJ was not required to include additional mental  
 18 limitations in his RFC assessment or hypothetical to the  
 19 VE. See *Burch v. Barnhart*, 400 F.3d 676, 684 (9th Cir. 2005)  
 20 (finding ALJ’s decision not to include plaintiff’s impairment in VE  
 21 hypothetical or RFC determination was proper because there was  
 22 no evidence plaintiff’s impairment caused any functional  
 23 limitations); *Carroll v. Berryhill*, 2018 WL 2175977, at \*6 (C.D.  
 24 Cal. May 10, 2018) (rejecting claim that ALJ was required to  
 25 include in RFC the mild limitation in social functioning finding  
 26 made at step two where plaintiff failed to point to any evidence  
 27 indicating that such limitation impacted claimant’s work abilities) .  
 28 . . . In sum, the ALJ considered the evidence related to Plaintiff’s  
 mental impairments before concluding not to include any mental  
 limitations in the RFC or in the hypothetical to the VE. That was  
 not error.

18 George A., 2019 WL 1875523, at \*4–5.

19 In Jones, the court found Hutton stood for principle that an ALJ errs if they “explicitly  
 20 neglect[] to consider a non-severe limitation when assessing the RFC,” citing to Ball v. Colvin,  
 21 2015 WL 2345652, at \*3 (C.D. Cal. May 15, 2015), for its distinguishing of Hutton as based on  
 22 the ALJ’s “explicit refusal” to consider the claimant’s mild mental limitations caused by PTSD  
 23 in the RFC. Jones v. Berryhill, No. EDCV 17-1138-AS, 2018 WL 3956479, at \*2–4 (C.D. Cal.  
 24 Aug. 15, 2018). The ALJ had found mild limitations at step two after a detailed discussion,  
 25 including of daily activities and the physician opinions, and the Jones court found no error  
 26 despite the fact the ALJ did not include any mental limitations in the RFC assessment:

27 Although the ALJ did not include any mental limitations in the  
 28 RFC assessment, (see AR 32), the ALJ “considered the functional  
 limitations resulting from all of [Plaintiff’s] medically

determinable impairments, including those that are nonsevere.” (AR 31 (citing 20 C.F.R. §§ 404.1545, 416.945)). Moreover, the ALJ stated that the RFC assessment “reflects the degree of limitation [the ALJ] found in the ‘paragraph B’ mental function analysis.” (AR 30). Because the ALJ found that Plaintiff’s mental impairments were non-severe and did not cause any significant impairments, the ALJ was not required to include them in Plaintiff’s RFC. See Ball, 2015 WL 2345652, at \*3 (“As the ALJ found that Plaintiff’s mental impairments were minimal, the ALJ was not required to include them in Plaintiff’s RFC.”); see also Hoopai v. Astrue, 499 F.3d 1071, 1077 (9th Cir. 2007) (explaining that the Ninth Circuit has not “held mild or moderate depression to be a sufficiently severe non-exertional limitation that significantly limits a claimant’s ability to do work beyond the exertional limitation.”). Thus, having considered the record evidence of Plaintiff’s mental limitations in assessing Plaintiff’s RFC, the ALJ did not err by declining to include mild mental limitations in the RFC finding.

Jones, 2018 WL 3956479, at \*2–4; see also McIntosh v. Berryhill, No. EDCV 17-1654 AGR, 2018 WL 3218105, at \*4 (C.D. Cal. June 29, 2018) (“In this case, unlike *Hutton*, the ALJ expressly considered Plaintiff’s mental impairment in formulating his residual functional capacity . . . ‘Because Plaintiff’s mental impairment was not severe and did not cause any significant impairment, the ALJ was not required to include it in Plaintiff’s RFC.’ ”) (quoting Banks v. Berryhill, 2018 U.S. Dist. LEXIS 56134, \*14, 2018 WL 1631277 (C.D. Cal. Apr. 2, 2018)); Malbog v. Kijakazi, No. CV 20-00500 JAO-RT, 2021 WL 4750574, at \*5–8 (D. Haw. Oct. 12, 2021) (“Courts have held that *Hutton* is distinguishable in cases where it was clear from the record that the ALJ considered and discussed limitations associated with the claimant’s non-severe impairments in constructing the claimant’s RFC.”); Miguel A. V. v. Saul, No. 8:20-CV-01560-AFM, 2021 WL 2864868, at \*2 (C.D. Cal. July 8, 2021) (“Courts in the Ninth Circuit have found *Hutton* to be inapplicable where the ALJ considered Plaintiff’s non-severe mental impairments at step four before concluding that those non-severe impairments did not necessitate inclusion of any mental limitations in the RFC . . . Other courts have followed *Hutton* where the ALJ’s decision did not reflect any reasoned consideration in the RFC of Plaintiff’s mild mental limitations . . . Despite finding Plaintiff’s mental impairments to be non-severe, the ALJ stated that she nonetheless considered them at step four of Plaintiff’s RFC assessment . . . The ALJ also considered the opinions of psychological consultants J. Tendler, M.D., and D. Goosby, Psy.D., in

Plaintiff's RFC assessment."); Jann B. S. v. Kijakazi, No. 4:20-CV-00354-CWD, 2021 WL 4005986, at \*9–10 (D. Idaho Sept. 2, 2021) (finding no error under Hutton as “the ALJ specifically considered Petitioner’s non-severe mental impairments in evaluating Petitioner’s RFC [including the] opinions of state agency medical consultants . . . [in addition to finding] Petitioner’s reported symptoms were disproportionate to the objective findings in the medical record, and inconsistent with Petitioner’s own testimony . . . [and] supported these findings with specific references to inconsistencies in the record [and thus] concluded Petitioner’s statements concerning the intensity, persistence, and limiting effects of her cognitive symptoms were not consistent with the record, and concluded that her past relevant work does not require performance of work-related activities precluded by Petitioner’s RFC.”); Charles L. v. Saul, No. 20-CV-00143-DEB, 2021 WL 856997, at \*3 (S.D. Cal. Mar. 8, 2021) (“Hutton is inapposite because the ALJ here considered Plaintiff’s mental impairments in the RFC . . . by analyzing and giving ‘great weight’ to Dr. Nicholson’s opinion [and because additionally] the ALJ considered Plaintiff’s own testimony about his mental limitations but found it ‘did not fully comport’ with his ‘conservative treatment’ and ‘strenuous activities of daily living[,]’ [and thus] the ALJ properly supported his finding that Plaintiff’s mental impairments were not severe, and any error was harmless because the ALJ considered all of Plaintiff’s limitations in the RFC.”).

#### **D. The Court Finds No Remandable Error**

The Court now turns to a further and more pointed discussion of the ALJ’s decision in light of the above caselaw and regulations.

Within the step 2 section of the decision, when finding mild limitations in three of the four areas of mental functioning, the ALJ considered in detail various forms of evidence pertaining to the mental limitations. In finding a mild limitation in the area of understanding, remembering, or applying information, in addition to the observation of Plaintiff understanding and appropriately responding during the hearing, the ALJ cited: that Plaintiff had intact memory in October of 2015; reports of normal memory in November of 2016, December of 2016, and January of 2017; that during the February 2017 consultative exam, Plaintiff remembered three out of three objects after five minutes; and in November of 2018, Plaintiff presented with

1 average intelligence and normal insight and judgment. (AR 149.) In finding a mild limitation in  
2 interacting with others, the ALJ weighed the following: that Plaintiff testified to social anxiety  
3 and difficulty getting along with others; that in the function report, she reported she goes to  
4 church, the library, and AA meetings; that in October of 2015, she felt anxious and had fearful  
5 thoughts; that in December of 2016, Plaintiff had an anxious mood, but cooperative behavior;  
6 that she was assessed with stable bipolar disorder; that in January of 2017, Plaintiff had an  
7 euthymic mood; that during the February 2017 consultative exam, Plaintiff was mildly depressed  
8 and mildly anxious, but showed no suicidal ideation; that in March of 2017, Plaintiff had a  
9 depressed mood, but normal behavior, and no suicidal ideation; that in August of 2017, Plaintiff  
10 had an appropriate mood and affect; that in June of 2018, the Plaintiff had a labile mood, but  
11 appropriate affect; and that in November of 2018, Plaintiff had average eye contact, cooperative  
12 attitude, logical thought process, full affect, and clear speech. (AR 149.) In finding a mild  
13 limitation in the area of concentrating, persisting, or maintaining pace, the ALJ cited to:  
14 Plaintiff's testimony that she had difficulty concentrating; that in November of 2016, Plaintiff  
15 was fully oriented; that during the February 2017 consultative examination, Plaintiff was alert  
16 and oriented times three; that in October of 2017, Plaintiff was alert and oriented times three; and  
17 that in November of 2018, Plaintiff reported some impairment of attention/concentration, but her  
18 cognition was reported as within normal limits. (AR 149.)

19       Additionally within the step 2 section of the decision, after finding mild limitations in  
20 three of the four areas (AR 149-150), and following the ALJ's express statement that the RFC  
21 reflects the degree of limitation found in the paragraph B mental function analysis (AR 150), the  
22 ALJ further elaborated on the medical opinion evidence. There, the ALJ stated: "[a]s for the  
23 mental opinion evidence, the state psychological consultants and the claimant's consultative  
24 examiner found that the claimant had nonsevere mental impairments . . . [t]heir opinions are  
25 supported by mental status examinations that showed a depressed mood at times, a normal mood  
26 at other times, but otherwise cooperative behavior . . . [t]heir opinions are supported by other  
27 mental status examinations that showed intact memory and the claimant being fully oriented . . .  
28 [t]herefore, their opinions are granted significant weight." (AR 150.) The ALJ then noted that in



1 a third-party report, the Plaintiff's niece opined the Plaintiff was limited in memory, completing  
2 tasks, and concentration, and the ALJ conversely granted little weight to the report based on  
3 precisely the same reports as cited when granting the psychological consultant and consultative  
4 examiners opinions significant weight, finding the third party report to be contradicted by such  
5 evidence. (Id.)

6 Then, within the RFC section of the decision, in the same paragraph finding the alleged  
7 persistence and limiting effects of the symptoms to not be entirely consistent with the evidence  
8 of the record, the ALJ discussed additional evidence relating to Plaintiff's alleged mental  
9 ailments, stating:

10 Additionally, mental status examinations showed intact memory,  
11 the claimant was fully oriented, the claimant showed a depressed  
12 mood at times, a normal mood other times, but otherwise  
13 cooperative behavior . . . . Moreover, the claimant was engaging,  
14 friendly, and did not show physical or mental limitations during  
15 the hearing (hearing testimony). Lastly, the claimant is still able to  
perform activities of daily living, as the claimant reported that she  
takes short walks, drives, waters plants, shops, handles financial  
accounts, and occasionally hikes and camps (Exhibit 3E).<sup>6</sup> The  
above factors show that the claimant's impairments are not  
disabling.

16 (AR 152.)

17 Finally, the ALJ concluded the RFC subsection by stating: "In sum, the above residual  
18 functional capacity assessment is supported by evidence in the record of full strength and normal  
19 walking. The record shows the claimant had stable psychological functioning in the record."

20 (AR 153.)

21 Given the caselaw and regulations above, and based on the Court's review and  
22 summarization herein of the relevant portions of the ALJ's opinion, specifically of finding 3  
23 (step 2) and finding 5 (RFC), the Court finds no remandable error within the ALJ's decision. 4

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25 <sup>6</sup> As the Court noted above when summarizing the hearing testimony above, when the ALJ asked about camping  
26 and hiking, the Plaintiff answered that she meant to answer that such activities were previous hobbies and that she  
27 no longer hikes or camps. (AR 179.) The Court notes that the questionnaire reflects that under hobbies and  
28 interests, Plaintiff answered: aerobics, hiking, camping, gardening, crafts, horseback riding, sewing. Where asked  
how often, the Plaintiff did answer: "Occasional hiking camping. Others on a daily basis, however my back  
condition always dictates the level of activity." (AR 410.) Plaintiff did not challenge the ALJ's listing of the  
camping and hiking aspect of the listed activities utilized by the ALJ when finding in part that such activities  
supported the finding that Plaintiff's impairments were not disabling.

1 Unlike Hutton, the ALJ here did not expressly decline to consider Plaintiff's mental  
2 impairments and the ALJ's own finding of a mild limitation stemming from such. See Jones,  
3 2018 WL 3956479, at \*2–4 (distinguishing of Hutton as based on the ALJ's "explicit refusal" to  
4 consider the claimant's mild mental limitations caused by PTSD in the RFC); McIntosh, 2018  
5 WL 3218105, at \*4 ("In this case, unlike *Hutton*, the ALJ expressly considered Plaintiff's mental  
6 impairment in formulating his residual functional capacity.").

7 The ALJ completed a significant discussion of Plaintiff's mental impairments when  
8 finding only mild limitations at step 2. The ALJ then did consider evidence relating to Plaintiff's  
9 mental impairments after step two in a reasoned manner within the RFC determination, including  
10 discussion of the mental status examinations, mental limitations demonstrated during the  
11 hearing, and daily activities (AR 152), before determining that the RFC is supported by the  
12 evidence in the record pertaining to strength, walking, and the "stable psychological  
13 functioning," (AR 153). See Sanguras, 2021 WL 973940, at \*5 ("As in *Denney* and *George A.*,  
14 it is clear the ALJ considered evidence related to Plaintiff's mental impairments after step two,  
15 including her activities of daily living and evidence concerning her ability to complete tasks and  
16 follow instructions."); Denney, 2019 WL 4076717, at \*7–8 ("The ALJ did not err in addressing  
17 Plaintiff's mental impairments in great detail at step two and briefly at step four. Although an  
18 ALJ must discuss and evaluate evidence leading to his conclusion, he is not required to do so  
19 under any particular heading in his written decision."); Thompson, 2019 WL 3302471, at \*7  
20 ("Moreover, at step four, the ALJ expressly considered evidence of Plaintiff's mental  
21 impairments."); George A., 2019 WL 1875523, at \*4–5 ("[I]n assessing Plaintiff's RFC at step  
22 four, the ALJ considered Plaintiff's mental impairments again . . . [including] report of the  
23 psychiatric consultative examiner . . . [and] other evidence . . . [including] daily activities.");  
24 Miguel A., 2021 WL 2864868, at \*2 ("Despite finding Plaintiff's mental impairments to be non-  
25 severe, the ALJ stated that she nonetheless considered them at step four of Plaintiff's RFC  
26 assessment . . . The ALJ also considered the opinions of psychological consultants . . . in  
27 Plaintiff's RFC assessment."); Jann B., 2021 WL 4005986, at \*9–10 ("the ALJ specifically  
28 considered Petitioner's non-severe mental impairments in evaluating Petitioner's RFC [including



1 the] opinions of state agency medical consultants . . . [in addition to finding] Petitioner's reported  
2 symptoms were disproportionate to the objective findings in the medical record, and inconsistent  
3 with Petitioner's own testimony."); Charles L., 2021 WL 856997, at \*3 ("*Hutton* is inapposite  
4 because the ALJ here considered Plaintiff's mental impairments in the RFC . . . by analyzing and  
5 giving "great weight" to Dr. Nicholson's opinion [and because additionally] the ALJ considered  
6 Plaintiff's own testimony about his mental limitations.").

7       This reasoned further discussion in conjunction with the express incorporation of the step  
8 two findings within the RFC, distinguishes this from other cases finding error, and the Court  
9 finds this was not a hollow boilerplate incorporation of the paragraph B criteria within the RFC.  
10 The ALJ did consider Plaintiff's alleged mental impairments in the RFC analysis section of the  
11 decision, and considered additional evidence related to the mental impairments. See Aida I.,  
12 2020 WL 434319, at \*4–5 ("In the Court's view, the objective evidence of specific mild  
13 functional limitations here, which the ALJ never stated he was rejecting, is what distinguishes  
14 this case from cases in which courts have found *Hutton* to be inapplicable."); Solomon, 376 F.  
15 Supp. 3d at 1021–22 ("Here, in contrast, the record is silent on this key issue—the ALJ's opinion  
16 does not explain why Solomon's mental impairments were omitted from the RFC and  
17 hypotheticals."); Carlson, 2019 WL 1116241, at \*17–18 ("As in *Hutton*, the ALJ did not discuss  
18 or give reasoned consideration of the plaintiff's depression and anxiety in his RFC assessment.");  
19 Uranna G., 2019 WL 5342537, at \*4 ("The decision does not contain any discussion or reflect  
20 any reasoned consideration of the mild limitations caused by plaintiff's anxiety impairment in  
21 connection with Finding No. 5 (RFC)."); Smith, 2015 WL 9023486, at \*8–9 ("The current record  
22 is unclear as to whether the ALJ properly considered the claimant's mild mental limitations when  
23 assessing her RFC."); Gates, 2017 WL 2174401, at \*2–3 ("According to *Medlock*, the  
24 'consideration' requirement is met if the ALJ 'actually reviews the record and specifies reasons  
25 supported by substantial evidence for not including the non-severe impairment....' Here, the  
26 ALJ's decision does not reflect an actual consideration and reasoned determination as to why the  
27 mild social functioning limitation was not included in the RFC.").

28       The Court further finds no error in the ALJ's presentation of various hypotheticals to the

VE.<sup>7</sup> See Sanguras, 2021 WL 973940, at \*6 (“Thus, if an ALJ finds a mild mental impairment is adequately addressed in an RFC that omits mental limitations, the hypothetical questions posed to the vocational expert need not include mental limitations . . . . Because the ALJ determined Plaintiff’s nonsevere depression did not require limitations in the RFC, the ALJ did not need to include mental limitations in the hypothetical questions posed to the vocational expert to determine Plaintiff’s ability to perform work in the national economy.”); George A., 2019 WL 1875523, at \*4–5 (“Given the absence of evidence that Plaintiff’s mild mental impairments limited Plaintiff’s ability to perform any work-related activities, the ALJ was not required to include additional mental limitations in his RFC assessment or hypothetical to the VE.”); Jones, 2018 WL 3956479, at \*2–4 (“Because the ALJ found that Plaintiff’s mental impairments were non-severe and did not cause any significant impairments, the ALJ was not required to include them in Plaintiff’s RFC.”).

The Court finds the ALJ’s RFC determination to be supported by substantial evidence and the decision as a whole to be free from remandable harmful error.

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<sup>7</sup> The Court does note that the ALJ did present one mental limitation in a hypothetical. Specifically, the ALJ presented a hypothetical person that would be precluded from public contact work due to anxiety, and the VE stated that would eliminate anything that is sales related, and the only job that might still be available would be the administrative assistant, but the VE would need more information about public contact involved in the position. (AR 192.) Plaintiff answered that the assistant position was at a medical repair facility, so she was on the phones, doing shipping and receiving, and was the liaison with the corporate office. (Id.) The VE confirmed such position would involve occasional public contact eliminating the position. (AR 193.) The parties do not appear to address the fact that at least one mental limitation was presented in a hypothetical to the VE. The Court finds this would add support for the position that the ALJ made the decision not to include any mental limitations in the RFC after considering the mental limitations in the RFC determination. The Court further notes that at finding six of the ALJ’s decision, the ALJ stated that “[i]n comparing the claimant’s residual functional capacity with the physical **and mental demands** of this work, the undersigned finds that the claimant is able to perform it as **generally performed.**” (AR 153 (emphasis added).)

V.

**CONCLUSION AND ORDER**

Based on the foregoing, the Court finds that the ALJ did not err in the determination of Plaintiff's RFC, and did not err by failing to include the finding of mild mental limitations in Plaintiff's RFC. The ALJ's decision is supported by substantial evidence and free of remandable error. Accordingly, IT IS HEREBY ORDERED that Plaintiff's appeal from the decision of the Commissioner of Social Security is DENIED. It is FURTHER ORDERED that judgment be entered in favor of Defendant Commissioner of Social Security and against Plaintiff Judith Lee Frary. The Clerk of the Court is DIRECTED to CLOSE this action.

IT IS SO ORDERED.

Dated: November 17, 2021

  
UNITED STATES MAGISTRATE JUDGE